RECORD AND BRIEFS

No. 15-1500

In the Supreme Court of the United States

BRIAN LEWIS AND MICHELLE LEWIS, PETITIONERS

v.

WILLIAM CLARKE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

Page

A. The decision below contributes to a conflict in the lower courts 2
B. Individual-capacity actions are defined by the remedy the plaintiff seeks, not the capacity in which the defendant acted 6
C. The decision below is contrary to this Court's cases limiting the scope of sovereign immunity in actions against government officials 8

TABLE OF AUTHORITIES

Cases:

Alden v. *Maine*, 527 U.S. 706 (1999) 7
Atkinson Trading Co. v. *Shirley*, 532 U.S. 645 (2001) 11
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 8, 9
Burrell v. *Armijo*, 603 F.3d 825 (10th Cir. 2010) 5
Cook v. *Avi Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008), cert. denied, 556 U.S. 1221 (2009) 4
FDIC v. *Meyer*, 510 U.S. 471 (1994) 9
Frazier v. *Simmons*, 254 F.3d 1247 (10th Cir. 2001) 5
Hafer v. *Melo*, 502 U.S. 21 (1991) 7, 8, 10
Hardin v. *White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985) 4
Kentucky v. *Graham*, 473 U.S. 159 (1985) 7

Cases—Continued: Page

Maxwell v. *County of San Diego*, 708 F.3d 1075 (9th Cir. 2013) 3, 4, 6
McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973) 5
Michigan v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014) 12
Monell v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978) 7
Montana v. *United States*, 450 U.S. 544 (1981) 11
Murgia v. *Reed*, 338 Fed. Appx. 614 (9th Cir. 2009) 4
Native Am. Distrib. v. *Seneca–Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008) 5, 6
New Mexico v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983) 5
Pistor v. *Garcia*, 791 F.3d 1104 (9th Cir. 2015) 3, 4, 6
Scheuer v. *Rhodes*, 416 U.S. 232 (1974) 8, 10
Shermoen v. *United States*, 982 F.2d 1312 (9th Cir. 1992), cert. denied, 509 U.S. 903 (1993) 3
United States v. *Wheeler*, 435 U.S. 313 (1978) 11
Wagnon v. *Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) 12
Westfall v. *Erwin*, 484 U.S. 292 (1988) 9
Will v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) 7, 10
Young v. *Fitzpatrick*, 133 S. Ct. 2848 (2013) 2

Statutes:

Act of Oct. 6, 1976 (Gonzalez Act), Pub. L. No. 94-464, 90 Stat. 1985 10

Statutes—Continued: Page

Act of Sept. 21, 1961, Pub. L. No. 87-258, 75 Stat. 539 10

Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 ..... 9, 10

42 U.S.C. 1983 10

Conn. Gen. Stat. § 4-165 10

Miscellaneous:

Steven W. Perry, U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of Tribal Justice Agencies in Indian Country, 2002* (2005) 12

S. Rep. No. 736, 87th Cong., 1st Sess. (1961) 9

S. Rep. No. 1264, 94th Cong., 2d Sess. (1976) 10

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REPLY BRIEF FOR THE PETITIONERS

The Connecticut Supreme Court held that the sovereign immunity of an Indian tribe bars an action seeking damages from a tribal employee personally—not from the tribe itself—based on that employee's off-reservation negligent driving. While its conclusion accords with a decision of the Second Circuit and the Montana Supreme Court, it conflicts with decisions of the Ninth and Tenth Circuits, and it extends tribal sovereign immunity more broadly than the sovereign immunity of the federal government and the States. It warrants this Court's review and correction.

Respondent argues that the circuit conflict is poorly developed, but the Ninth and Tenth Circuits have

both articulated a view of tribal sovereign immunity that is irreconcilable with the decision below, and the Ninth Circuit has repeatedly applied that view in denying immunity claims like respondent's. Respondent also attempts to defend the merits of the decision below, but his argument is contrary to this Court's decisions explaining that sovereign immunity applies only when a plaintiff seeks relief that would operate against the sovereign, not when a plaintiff seeks damages from a government employee personally.

Respondent does not deny the importance of the question presented, which affects the potential tort liability of hundreds of thousands of tribal employees nationwide. Nor does respondent suggest that this case is an inadequate vehicle for considering it. Unlike in *Young* v. *Fitzpatrick*, 133 S. Ct. 2848 (2013), a case raising a similar question in which this Court called for the views of the Solicitor General but ultimately denied certiorari, the question presented here was preserved and considered by the court below. This Court should grant the petition to resolve this important legal issue.

A. The decision below contributes to a conflict in the lower courts

The Connecticut Supreme Court held that tribal sovereign immunity bars petitioners' negligence claims even though petitioners seek money damages from respondent individually, not from the Mohegan Tribe. That is so, the court said, because respondent "was an employee of the tribe and was acting within the scope of his employment when the accident occurred." Pet. App. 16a. In the court's view, tribal em-

ployees are subject to individual damages liability only when they act outside the scope of their official authority. *Id.* at 16a-17a. As explained in the petition (at 7-10), the Ninth and Tenth Circuits disagree. Respondent argues (Br. in Opp. 8) that the conflict is "poorly-developed," but that is incorrect.

1. The Ninth Circuit has held that "tribal defendants sued in their *individual* capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties." *Pistor* v. *Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015). And it has cautioned that "[i]n any suit against tribal officers, we must be sensitive to whether 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act.'" *Maxwell* v. *County of San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013) (quoting *Shermoen* v. *United States*, 982 F.2d 1312, 1320 (9th Cir. 1992), cert. denied, 509 U.S. 903 (1993)) (second brackets in original). If so, the suit is "in reality an official capacity suit"—that is, it is effectively one against the tribe—and sovereign immunity will apply. *Id.* at 1089. But individual-capacity suits against tribal officials do not seek relief from the tribe, and therefore they are not barred by tribal sovereign immunity. *Id.* at 1088; *Pistor*, 791 F.3d at 1112.

Respondent asserts (Br. in Opp. 18) that "[t]he Ninth Circuit has reached contradictory results in tort suits against tribal officers and employees in their individual capacity," but the cases he cites do not support that proposition. All three cases predate *Max-*

well, and the two published decisions—*Cook* v. *Avi Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008), cert. denied, 556 U.S. 1221 (2009), and *Hardin* v. *White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985)—were expressly addressed by the *Maxwell* court, which explained that they involved official-capacity rather than individual-capacity suits. *Maxwell*, 708 F.3d at 1088-1089. The third case, *Murgia* v. *Reed*, 338 Fed. Appx. 614 (9th Cir. 2009), is an unpublished decision that lacks precedential force.

Respondent cannot deny that the results in *Maxwell* and in *Pistor* are irreconcilable with the decision below: in both cases, the Ninth Circuit allowed individual-capacity damages actions to proceed against tribal employees for acts within the scope of their employment. Instead, like the court below, respondent emphasizes (Br. in Opp. 22) that *Maxwell* involved allegations of gross negligence, not ordinary negligence. As explained in the petition (at 12-14), however, neither *Maxwell* nor *Pistor* suggested that the defendants' level of negligence was relevant to sovereign immunity. A defendant's level of negligence might be relevant to whether he or she was acting within the scope of employment—although even that is doubtful, see Pet. 13—but in the Ninth Circuit, sovereign immunity depends only on the capacity in which a defendant is sued, not on the capacity in which he or she was acting at the time of the events giving rise to the litigation.

The complaint in this case seeks money damages from respondent personally, not from the Mohegan Tribe. Pet. App. 3a. For that reason, the Ninth Cir-

cuit would not have held that this action is barred by sovereign immunity.

2. Like the Ninth Circuit, the Tenth Circuit has recognized that the availability of tribal sovereign immunity depends on "whether the sovereign is the real, substantial party in interest," which "turns on the relief sought by the plaintiffs." *Native Am. Distrib.* v. *Seneca–Cayuga Tobacco Co.*, 546 F.3d 1288, 1296, 1297 (10th Cir. 2008) (quoting *Frazier* v. *Simmons*, 254 F.3d 1247, 1253 (10th Cir. 2001)). In arguing that the Tenth Circuit's law is unclear, respondent relies (Br. in Opp. 14-15) on *Burrell* v. *Armijo*, 603 F.3d 825 (10th Cir. 2010), in which the court rejected an effort to subject a tribal governor to a damages action based on his regulation of plaintiffs' activities on tribal farmland leased from the tribe. *Id.* at 832. Although the court used the phrase "sovereign immunity," it did not discuss the distinction between official-capacity and individual-capacity actions recognized in *Native American Distributing*, and the result it reached is readily understandable on the basis of "the right of reservation Indians to make their own laws and be ruled by them" on Indian reservations, a right that necessarily insulates some tribal policymaking from challenge in litigation. *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973)). In the circumstances of this case—which, unlike *Burrell*, does not involve a challenge to a discretionary policy decision by senior tribal officials—there is little reason to doubt that the Tenth Circuit would follow the analysis set out in *Native American Distributing*, nor that that analysis would

lead it to reject the conclusion of the Connecticut Supreme Court.

3. In suggesting that the circuit conflict is "shallow" (Br. in Opp. 8), respondent overlooks that the courts that have already taken a position on the question presented—including the Second, Ninth, and Tenth Circuits—have jurisdiction over a large fraction of the nation's Indian tribes and account for much of the litigation in this area of the law. Moreover, enough courts have taken the Connecticut Supreme Court's side of the conflict that it is unlikely they will all change their position. And because the Ninth Circuit's decisions in *Maxwell* and *Pistor* and the Tenth Circuit's decision in *Native American Distributing* are consistent with this Court's cases distinguishing official-capacity from individual-capacity suits, further consideration will not lead those courts to change their positions and adopt the view of the Connecticut Supreme Court.

B. Individual-capacity actions are defined by the remedy the plaintiff seeks, not the capacity in which the defendant acted

Respondent relies heavily on the theory that suing tribal employees in their individual capacities is merely "a trick of pleading" (Br. in Opp. 20). In his view, the only difference between an official-capacity action and an individual-capacity action is "[t]he label that a plaintiff chooses to attach to a tribal employee" (Br. in Opp. 9), and allowing the availability of sovereign immunity to turn on that distinction would represent "the elevation of form over substance" (Br. in Opp. 13). That argument lacks merit because "the distinction

between official-capacity suits and personal-capacity suits is more than 'a mere pleading device.'" *Hafer* v. *Melo*, 502 U.S. 21, 27 (1991) (quoting *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989)).

As explained in the petition (at 14-16), official-capacity and individual-capacity actions both relate to the conduct of government officials. The difference is that official-capacity actions treat those officials as agents of the sovereign and seek relief from the sovereign. In other words, they "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985) (quoting *Monell* v. *New York City Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)). For that reason, an official-capacity suit "is no different from a suit against the State itself." *Will*, 491 U.S. at 71. By contrast, individual-capacity actions are brought against the official alone and seek relief from the official personally. That has a significant practical effect on the litigation: "[A]n award of damages against an official in his personal capacity can be executed only against the official's personal assets." *Graham*, 473 U.S. at 166.

Because an official-capacity action is really an action against the sovereign, government officials sued in their official capacity benefit from sovereign immunity. *Alden* v. *Maine*, 527 U.S. 706, 756-757 (1999). But those sued in their individual capacity do not. When officials are sued in their individual capacity, whether they acted within the scope of their authority is not "determinative" of the availability of sovereign immunity (Br. in Opp. 10); it is not even relevant.

In suggesting otherwise, respondent makes precisely the error identified by this Court in *Hafer*—he fails to appreciate that "the phrase 'acting in their official capacities,'" when used in describing official-capacity claims, "is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." 502 U.S. at 26. Under *Hafer*, sovereign immunity "does not erect a barrier against suits to impose 'individual and personal liability'" on government officials, even if that liability is based on acts they took in the course of their official duties. *Id.* at 30-31 (quoting *Scheuer* v. *Rhodes*, 416 U.S. 232, 238 (1974)).

C. The decision below is contrary to this Court's cases limiting the scope of sovereign immunity in actions against government officials

In extending sovereign immunity to bar individual-capacity damages actions against tribal employees, the Connecticut Supreme Court applied a version of sovereign immunity significantly broader than that enjoyed by the federal government and the States. Respondent's efforts to resist that conclusion are unavailing.

1. As explained in the petition (at 17-18), the sovereign immunity of the United States does not bar individual-capacity damages actions against federal employees for acts within the scope of their official duties. Respondent observes (Br. in Opp. 25) that many such actions are brought under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and that "[a] *Bivens* action requires a constitutional violation by a government offi-

cial, not merely negligent conduct within the scope of his job." That is true, but it is irrelevant to sovereign immunity. The Court in *Bivens* recognized a cause of action. It did not create an exception to sovereign immunity, and it could not have done so: "However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit." *Id.* at 410 (Harlan, J., concurring in the judgment). In other words, the Court "implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available." *FDIC* v. *Meyer*, 510 U.S. 471, 485 (1994). The premise of *Bivens* is that sovereign immunity does not apply to individual-capacity damages actions against federal officers.

Respondent also emphasizes (Br. in Opp. 25) that federal officers are generally immune from suit for non-constitutional torts committed within the scope of their employment. But that immunity is not sovereign immunity; it is a statutory immunity created by Congress. Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563. Before Congress acted, federal employees were *not* immune from individual-capacity actions based on their non-discretionary conduct. *Westfall* v. *Erwin*, 484 U.S. 292 (1988). Congress understood that sovereign immunity did not eliminate the personal liability of government employees, and in the Westfall Act and its predecessor statutes, Congress recognized that legislation was necessary to "exclude suits against employees in their individual capacities." S. Rep. No. 736, 87th Cong., 1st

Sess. 4 (1961); Act of Sept. 21, 1961, Pub. L. No. 87-258, 75 Stat. 539 (individual official immunity for federal drivers); see also S. Rep. No. 1264, 94th Cong., 2d Sess. 3 (1976) ("Defense medical personnel have long been subject to personal liability for actions arising out of their official medical duties."); Act of Oct. 6, 1976 (Gonzalez Act), Pub. L. No. 94-464, 90 Stat. 1985 (individual official immunity for armed forces medical personnel).

2. Respondent argues that state employees enjoy sovereign immunity when sued in their individual capacities, but in fact such actions are common—and not barred by sovereign immunity—under 42 U.S.C. 1983. He attempts to overcome that difficulty by arguing (Br. in Opp. 23) that "Section 1983 abrogates sovereign immunity." That is incorrect. This Court has held that Section 1983 does not authorize a suit against a State, in part because "Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity." *Will*, 491 U.S. at 66. Damages actions against state officials are permissible not because Section 1983 has eliminated sovereign immunity but because "the Eleventh Amendment," which guarantees that immunity, simply "does not erect a barrier against suits to impose 'individual and personal liability' on state officials." *Hafer*, 502 U.S. at 30-31 (quoting *Scheuer*, 416 U.S. at 238).

Respondent points out (Br. in Opp. 24-25) that petitioners could not have brought an action like this one against a Connecticut state employee. But that is not because of sovereign immunity; it is because Connecticut has enacted a statute like the Westfall Act. Conn. Gen. Stat. § 4-165. The existence of that statute con-

firms the general rule that, in the absence of legislation, government officials are not immune from individual damages liability for acts undertaken in the scope of their employment.

3. Respondent emphasizes (Br. in Opp. 26) that the Mohegan Tribe has adopted a statute requiring petitioners to seek relief exclusively from the Tribe in tribal court. The Connecticut Supreme Court did not rely on that statute, and with good reason: the Tribe lacks authority to strip petitioners of their state-law rights by insulating respondent from liability for his off-reservation conduct.

This Court has held that tribes do not possess the authority "to determine their external relations" with non-Indians. *United States* v. *Wheeler*, 435 U.S. 313, 326 (1978). Even within a reservation, "tribes lack civil authority over the conduct of nonmembers on non-Indian fee land." *Atkinson Trading Co.* v. *Shirley*, 532 U.S. 645, 647 (2001). Instead, a tribe's authority over nonmembers is limited to "the activities of nonmembers who enter consensual relationships with the tribe or its members," and to "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Montana* v. *United States*, 450 U.S. 544, 565, 566 (1981). It follows *a fortiori* that a tribe may not assert its jurisdiction to displace the state-law rights of nonmembers based on conduct occurring miles away from the reservation, where the nonmembers' only "relationship" with the tribe was as unsuspecting victims of a tribal employee's negligent driving.

Nor does any principle of federal law, or any interest of tribal sovereignty or self-determination, justify displacing state law in these circumstances. To the contrary, "'Indians going beyond reservation boundaries' are subject to any generally applicable state law," and so are a tribe's non-Indian employees. *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) (quoting *Wagnon* v. *Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005)). As noted in the petition (at 21), respondent's negligent driving constituted an infraction of a Connecticut criminal statute for which respondent was subject to a fine. Respondent has made no effort to explain why he should be immune from civil damages in state court when he is subject to a state criminal fine.

Finally, respondent does not acknowledge the broad implications of the decision below, which applies to all tribes, whether or not they have provided their own tort remedies. Many tribes have not created a tort-claims procedure; many have no court systems at all. Steven W. Perry, U.S. Dep't of Justice, Bureau of Justice Statistics, *Census of Tribal Justice Agencies in Indian Country, 2002*, at iii (2005). As applied in those contexts, the decision below will leave injured plaintiffs with no remedy. That is not, as respondent would have it (Br. in Opp. 3), a result embraced in *Bay Mills*; it is a radical expansion of the immunity recognized in that decision, and an unwarranted curtailment of the ability of a State "to enforce its law on its own lands." *Bay Mills*, 134 S. Ct. at 2035.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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